2009

Right to Bear Arms

Robert J. Cottrol
George Washington University Law School, bcottrol@law.gwu.edu

THE OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY

STANLEY N. KATZ

EDITOR IN CHIEF

VOLUME 1

Abbasid Dynasty–Cicero

OXFORD
UNIVERSITY PRESS
2009

de Matienzo's *Gobierno del Perú*, Antonio de Leon Pinelo's *Tratado de confirmaciones reales, encomiendas, oficios y casos en que se requiren para las Indias,* and Juan de Hevia Bolanos's *Curia Filípica*.

Juridical problems were handled by *audiencias*, municipal governments (*cabildos*), royal revenue officials (*oficiales reales*), and numerous separate tribunals for ecclesiastical, commercial, mining, and military disputes. In the Rio de la Plata region, this legal framework remained in place until the first revolutionary movements of 1810. The Castilian-Indian law (*derecho castellano-indiano*) survived until it was absorbed by codification. Gradual changes took place, mainly regarding political organization in the change from monarchy to republic. In the first decades of the nineteenth century commercial matters were still dealt with under Castilian law and the Spanish Commercial Code of 1829 in some provinces, while civil cases fell under Castilian-Indian law.

In 1853 a Republican Constitution was approved, based on Spanish antecedents and North American constitutional law. Codification of other laws began in Argentina in 1862 with the Commercial Code, whose authors were Eduardo Acevedo and Dalmacio Vélez Sársfield, continued in 1869 with the Civil Code (1871), also written by Sársfield and based on numerous Latin American and European models, including the Spanish Civil Code of 1851, Andrés Bello's code in Chile, Freitas's Brazilian *Esbozo*, the Napoleonic Code of 1804, and Castilian-Indian law. The sources of this Civil Code also include various French theoretical legal works of the nineteenth century. It was the first Civil Law that consciously adopted the distinction between rights from obligations and real property rights, thus distancing itself from the French model. The Penal Code and a Mining Code were implemented in 1886. Throughout the twentieth century these codes were re-formed, replaced, and subjected to numerous additions.

The juridical ideas of the nineteenth and twentieth century were based on European concepts and new political situations. Among the most important doctrinal writings we find Manuel Antonio de Castro's *Prontuario de Práctica Forense*, Pedro de Somellera's *Principios de Derecho Civil*, Juan Bautista Alberdi's *Fragmento preliminar al estudio del derecho*, Nicolás Avellaneda's *Las dos escuelas del derecho*, Carlos Tejedor's *Curso de Derecho Mercantil* and *Derecho Criminal*, Dalmacio Vélez Sársfield's *Derecho Público Eclesiástico*, and the works of the first commentators of the Civil Code: Lisandro Segovia, José Olegario Machado, and Baldomero Llerena.

The Constitution of 1853 represents an early effort to unify the country and was promulgated after several failed attempts, for example, in 1819 and 1826. It mandates separation of legislative, executive, and judicial power at national and provincial levels. There is a president and the bicameral legislature consists of the Senate (72 members, elected for six years) and the Chamber of Deputies (257 members, elected for four-year terms). Proportional representation is used and one-third of the candidate list of each party must be women. The Supreme Court of Justice has seven members appointed by the president in consultation with the Senate.

[*See also* Bello, Andres.]

BIBLIOGRAPHY

Benton, Lauren. *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900*. Cambridge: Cambridge University Press, 2001. An important analysis on legal regimes and colonial cultures.

Cruz Barney, Óscar. *Historia del Derecho en México*. Mexico City: Oxford University Press, 1999. A complete overview and analysis of Castilian-Indian and Mexican law.

Cutter, Charles. *The Legal Culture of Northern New Spain, 1700–1810*. Albuquerque: University of New Mexico Press, 1996. A study on legal historical literature and law in New Spain (today's Mexico) and peripheral areas of New Mexico and Texas during the eighteenth and early nineteenth centuries.

Mirow, Matthew. *Latin American Law: A History of Private Law and Institutions in Spanish America*. Austin: University of Texas Press, 2004. An excellent introduction to the history of private law and juridical institutions in Latin America, from the colonial period to the twentieth century.

VIVIANA KLUGER

ARMS, RIGHT TO BEAR. On Thursday, June 26, 2008, a closely divided U.S. Supreme Court in the case of *District of Columbia v. Heller* (554 U.S.) struck down the District of Columbia's statute banning the private ownership of handguns. The decision was based on the Second Amendment: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." The amendment had long been the subject of a passionate, even acrimonious debate. Gun-control advocates traditionally argued that the sole purpose of the amendment was to preserve state militias, not the private ownership of weapons. Supporters of the right to own firearms tended to emphasize the term "right of the people" in the amendment, arguing that the constitutional provision was meant to protect a right of individuals to have arms both to preserve a universal citizen's militia and for lawful private purposes such as self-defense. The 5 to 4 decision in *Heller* ended nearly seven decades of the Court's silence on the subject. Before *Heller* the Court had directly considered Second Amendment claims in only three cases, the last in 1939.

Roots of the Second Amendment. The amendment is rooted in English law, which traditionally required all free men to have arms for the common defense as members of both the sheriff's posse and the militia. The religious and political turmoil of seventeenth–century England helped

Militia. Local militia marching to war during the American Revolution. Print published by Currier & Ives, c. 1876. PRINTS AND PHOTOGRAPHS DIVISION, LIBRARY OF CONGRESS

transform that traditional duty into the modern notion of a constitutional right to bear arms. Efforts by Stuart kings to disarm Protestants met with popular resistance and helped implant into English thinking the idea that the right to possess arms provided important protection against tyrannical government. This view led to a provision in the English Bill of Rights of 1689 protecting the right of Protestants to have arms. By the eighteenth century, the right to possess arms, both for personal protection and as a counterbalance against state power, came to be viewed as fundamental on both sides of the Atlantic. In his *Commentaries on the Laws of England*, Sir William Blackstone listed the right to possess arms as an auxiliary right that helped protect the primary rights of life, liberty, and property.

The colonial experience strengthened the American appreciation for the right to have arms. English colonists were concerned with attacks from hostile Indian nations and from French and Spanish colonies. They were also concerned with maintaining control over potentially rebellious African slaves. In order to provide for the defense of often isolated colonies, special effort was made to ensure that white men, capable of bearing arms, were brought into the colonies. The American Revolution further strengthened the appreciation for an armed citizenry. The Revolution began with acts of rebellion by armed citizens. If history tells us that it was actually American and French regulars who ultimately defeated the British, the image of the ragtag, privately equipped militia successfully challenging the British Empire earned an enduring place in American thought. For the generation that fought the Revolution and authored the Constitution, this image reinforced Whiggish distrust of standing armies. It helped transform the idea of an armed populace and a militia of the whole from a matter of military necessity into a political notion, and one that would find its way into the new Constitution.

This view that an armed population contributed to political liberty as well as community security found its way into the debates over the Constitution and is key to understanding the Second Amendment. The provisions giving Congress the power to organize the militia excited fears among those who believed that the proposed Constitution could be used to destroy both state power and individual rights. Some expressed fear that Congress would use its power to establish a select militia, a small group of intensively trained men. Many feared this as much as they did a standing army, believing that either could be a tool of potential despots. Antifederalist critics of the new Constitution called for protection of the right to have arms and for a broad-based militia that could act as a check on the new federal government. In their efforts to answer these critics, Alexander Hamilton and James Madison addressed the charges that the new Constitution could destroy both the independence of the militia and deny arms to the population. Hamilton's responses are particularly interesting because he wrote as someone openly skeptical of the military value of the militia of the

whole, of a militia consisting of the armed citizenry at large. In *Federalist* number 29, Hamilton argued that a select militia was necessary for national defense. He nonetheless also called for arming the entire population as a reserve militia, in recognition of the strong political support for the concept. Madison's support was even stronger. In *Federalist* number 46, he made clear that he saw an armed population as a counterweight to potential despotism.

This desire to maintain a universal militia and an armed population played a critical part in the adoption of the Second Amendment. It is also important to remember that ownership of firearms for self-defense and hunting was widespread, with few restrictions for the white population. The Second Amendment, like the rest of the Bill of Rights, was designed to prevent the newly created federal government from encroaching on rights that were then enjoyed. It is significant that it was generally expected that militiamen would supply their own arms. One year after the ratification of the Bill of Rights, Congress passed the Militia Act of 1792, enrolling every free white male citizen between the ages of eighteen and forty-five in the militia. The act required every militia member to provide himself with arms.

Judicial Interpretation of the Second Amendment. Between the time of the amendment's adoption and the start of the Civil War, there was little opportunity for judicial interpretation of the provision. With the exception of state statutes prohibiting concealed weapons, there were few restrictions on arms. The major exception was laws restricting the possession of firearms by slaves and free blacks in the slave states. As it was generally held in antebellum America that the Bill of Rights only restrained the federal government, there was little occasion for federal courts to discuss the matter.

The antebellum period. A jurisprudence of the right to bear arms was developing in some state courts. By the early nineteenth century, most state constitutions protected the right to bear arms. A number of states also had statutes prohibiting the carrying of concealed weapons. In 1840 the Tennessee Supreme Court heard the appeal of William Aymette (*Aymette v. State*, 21 Tenn. 154 [1849]), who had been convicted under a state statute prohibiting the concealed carrying of bowie knives. The Tennessee Constitution declared that "the free white men of this state have a right to keep and bear arms for their common defence." The court declared two principles that would become important parts of the jurisprudence of the right to bear arms. First, it held that the open but not concealed carrying of weapons was constitutionally protected. Second, the court distinguished between arms useful for the common defense, which were constitutionally protected, and those that were primarily used by criminals, which were not. The U.S. Supreme Court would later cite *Aymette* for this second proposition.

Aymette reflected common agreement among antebellum jurists concerning the purposes and importance of the right to bear arms. This view was echoed by other antebellum legal commentators including St. George Tucker, who contrasted the Second Amendment's robust guarantee with what he saw as the more restrictive English right. Supreme Court Justice Joseph Story wrote of the right to bear arms as "the palladium of liberty." The only antebellum pronouncement from the Supreme Court on the subject came in Chief Justice Roger Taney's opinion in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). Taney indicated that blacks could be denied the right to possess arms, along with other rights of citizens such as freedom of speech, assembly, and travel.

The post–Civil War period. Reconstruction raised new issues concerning the Second Amendment and federalism. The end of the Civil War brought new conflict over the status of former slaves. Southern states passed legislation, the Black Codes, restricting the rights of blacks. These codes included prohibitions on blacks' ownership of weapons. These measures caused strong concerns in the Thirty-ninth Congress. Supporters of the Civil Rights Act of 1866 and the Fourteenth Amendment denounced the codes as the virtual reinstatement of slavery. A number of Republicans noted that Southern states were disarming black Union veterans while leaving former Confederates armed. During the debates over the Civil Rights Act and the Fourteenth Amendment, Republicans, including Representative Jonathan Bingham from Ohio and Senator Jacob Howard from New York, indicated that they intended that the new provisions protect citizens from state infringement of the Bill of Rights, including the right to bear arms. In 1867 the Thirty-ninth Congress passed the Freedman's Bureau Act, explicitly listing the right to bear arms as one right that federal authorities would safeguard for the former slaves.

Despite this history, the Supreme Court continued to adhere to its antebellum view that the Bill of Rights constrained only the federal government. The Court's first case involving an allegation of the violation of Second Amendment rights was brought by the federal government. Federal authorities prosecuted members of a white mob that had attacked a group of black men attempting to vote in Louisiana. The black men were armed, anticipating a mob attack. In the resulting case, *United States v. Cruikshank*, 92 U.S. 542 (1876), federal authorities charged members of the mob with violating the First and Second Amendment rights of the black victims. The Supreme Court rejected the view that the federal government could protect citizens from the actions of other private citizens, holding that the First and Second Amendments limited only the federal government.

The Court next examined the Second Amendment in *Presser v. Illinois*, 116 U.S. 252 (1886), which more directly

involved the question of whether or not the Fourteenth Amendment limited state action. That case involved a challenge to an Illinois statute prohibiting individuals who were not members of the organized militia from parading with arms. Although Justice William Woods's opinion noted that the statute did not infringe on the right to keep and bear arms, he nonetheless used the case to declare that the Second Amendment was a limitation on federal not state government. The Woods opinion was written before the Court had begun the process of incorporation or applying the Bill of Rights to the states. The postbellum Supreme Court contributed little toward the development of a jurisprudence of the Second Amendment, except to use the Second Amendment claims in *Cruikshank* and *Presser* as occasions to limit the scope of federal authority under the Fourteenth Amendment. Nonetheless, state courts interpreting state constitutional provisions wrestled with the vexing problem of developing a body of legal doctrine that balanced the right to keep and bear arms with notions of public safety and state police power. One 1871 Tennessee case, *Andrews v. the State,* 50 Tenn. 165 (1871), made a potential contribution to a broader jurisprudence of the right. *Andrews* separated the right to keep arms, viewing that as a private right, from the right to bear arms as an incident of militia service. *Andrews* also examined the modern issue of the relevance of the right to arms absent a system of universal militia training. The opinion noted that the right of the people to own arms ensured that citizens summoned into militia service would be familiar with weapons and would be able to provide arms for the occasion. This view was also echoed by the Michigan jurist Thomas M. Cooley. His constitutional commentaries anticipated and contested the modern view that the right extended only to the organized militia. Cooley stressed that the militia consisted of the whole population and not just that portion of the population selected for military training. The whole population, in Cooley's view, was entitled to possess and train with arms.

The nineteenth century would end with general agreement that the right to have arms was among the basic rights of Americans. There was, to be sure, little in the way of federal jurisprudence on the subject. Federal legislation regulating firearms scarcely existed in the nineteenth century, and even state restrictions on firearms ownership were relatively rare, a reflection that firearms were something of a necessity in the rural society of nineteenth-century America. That consensus would begin to change somewhat at the start of the twentieth century, as racial, ethnic, and labor tensions contributed to increased desires to limit the use of firearms on the part of perceived dangerous classes. Southern states used racially neutral statutes prohibiting the carrying of concealed weapons to disarm blacks in public places while permitting whites to remain armed. One Florida jurist even went so far as to publicly declare that that state's concealed-weapons statute was "never intended to be applied to the white population." In northern cities, fear of crime and political anarchy on the part of eastern and southern European immigrants led to the passage of licensing requirements for owning or carrying guns;, the most restrictive of these was New York's Sullivan Law, which required a license to own as well as to carry a pistol. It was passed in 1911.

The twentieth century. It was in this early-twentieth-century atmosphere that the collective-rights view of the right to bear arms first began to attract the attention of the judiciary. In *City of Salina v. Blaksley,* 72 Kan. 230, 231, 83 Pac. 619, 620 (1905), one of the earliest cases to adopt this view, the Supreme Court of Kansas interpreted that state's constitution to allow a statute prohibiting the carrying of deadly weapons, declaring that the right to bear arms was for militia and not individual purposes. In 1911 the Maine chief justice Lucilius A. Emery authored an essay, "The Constitutional Right to Keep and Bear Arms," in the *Harvard Law Review,* urging that the right to bear arms should be viewed as a right limited to militia service. Emery conceded that legislatures might be powerless to prohibit the keeping of arms, echoing the distinction made by the Tennessee Court in *Andrews*.

Despite these developments, there was little occasion for serious thought concerning the Second Amendment and no real occasion for Supreme Court pronouncement before World War I. The nation was still predominately rural. Restrictions on firearms ownership were anomalies in early-twentieth-century America. For most Americans, access to firearms was largely unimpaired at the beginning of the century, and there was little occasion for either the courts or constitutional commentators to spend much time on the subject.

This changed after World War I. Prohibition brought about the rise of organized gangs involved in the sale of bootleg alcohol. These gangs, often engaged in open warfare on the streets of the nation's major cities, terrified the public. In response, Congress passed the National Firearms Act in 1934, imposing registration requirements and a prohibitive tax on firearms that were deemed gangster weapons: automatic weapons and sawed-off rifles and shotguns. The 1934 act gave rise to the Supreme Court's decision in *United States v. Miller,* 307 U.S. 174 (1939).

The case arose in 1938 when Jack Miller was indicted for transporting an unregistered sawed-off shotgun. Miller's attorney challenged the indictment, contending that the National Firearms Act violated the Second Amendment. The district court agreed, quashing Miller's indictment.

The government appealed to the Supreme Court. Solicitor General Robert H. Jackson represented the government. His brief offered alternative theories as to why the National Firearms Act did not violate the Second Amendment. First, he asserted that the Second Amendment did not create the

right to bear arms; it merely recognized the preexisting right that had existed at common law. Because the common-law right had always been subject to statutory restrictions in the interests of public safety, Congress was able to restrict the right to bear arms for similar reasons. Second, the Jackson brief argued that the right was a collective one that protected the people when carrying arms as members of the state militia. Finally, Jackson contended that even if there were an individual right, the government could restrict weapons peculiarly adaptable for criminal purposes and not suitable for the common defense or other legitimate purposes. Jackson's brief noted: "But it is also indisputable that Congress was striking not at weapons intended for legitimate use but at weapons which form the arsenal of the gangster and desperado."

The Court's opinion, authored by Justice James McReynolds, focused on the second argument, namely that certain weapons were not militia weapons.

> In the absence of any evidence tending to show that the possession or use of a [sawed-off shotgun] . . . has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense (p. 178).

Advocates of the collective-rights view have emphasized the *Miller* court's focus on the militia, claiming that the Supreme Court held that the Second Amendment protects only state militias. But the opinion indicates that the Court saw a relationship between the individual right and the militia: "The Militia comprised all males physically capable of acting in concert for the common defense. 'A body of citizens enrolled for military discipline.' And further, that ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time" (p. 179). Essentially, *Miller* echoed *Aymette* in distinguishing between weapons suitable for the common defense, which might enjoy some constitutional protection, and weapons peculiarly suited to criminal use, which would not.

Although *Miller* was the Supreme Court's most comprehensive exploration of the Second Amendment until *Heller*, it had little effect on either firearms regulation or the general public's view concerning the right to keep and bear arms. For nearly two decades after *Miller*, little existed in the way of federal firearms regulation. State and local legislation existed, but with few exceptions such as New York's Sullivan Law, these laws were usually traditional regulations governing the manner of carrying weapons, not outright prohibitions. There was little serious attempt to mount constitutional challenges to these restrictions. The Second Amendment was thus bypassed in the postwar Supreme Court's process of applying most of the provisions of the Bill of Rights to the states. It is probably accurate to say that at least until the 1960s, most people thought relatively little about the Second Amendment, in part because firearms restrictions even on the state and local level were slight.

The Gun-Control Movement. It would take the turmoil of the 1960s and the tragedy of three assassinations to bring about the birth of the modern gun-control movement and the debate over the amendment's meaning. The assassination of President John F. Kennedy in 1963 brought about calls for stricter national controls on firearms. Urban riots and the assassinations of the civil-rights leader Martin Luther King Jr. and Senator Robert F. Kennedy helped lead to the passage of the Gun Control Act of 1968, the first federal legislation that seriously affected the ability of Americans to purchase firearms. The 1968 law limited the purchase of firearms through the mails and also restricted the importation of surplus military rifles. The act also prohibited the purchase of firearms by those with felony convictions. Some provisions of the 1968 act would later be modified in 1986.

The 1968 legislation proved to be something of a watershed. Since then, a national debate over gun control and a subsidiary debate over the Second Amendment have become perennial features of American life. The 1968 legislation and the growth of the gun-control movement also had the unintended consequence of turning the National Rifle Association (NRA) and other gun-owner support groups into an influential political movement. The NRA, which was founded in 1871, had traditionally been concerned with sport shooting and the development of marksmanship training programs. With the growth of the gun-control movement, the organization became increasingly involved in lobbying and electoral politics. From the 1970s on, it became involved in the passage of state legislation preempting local firearms regulation. This effort undoubtedly played a large role in preventing municipal handgun bans in a number of jurisdictions.

The Gun Control Act of 1968 gave many federal courts their first occasion to consider the meaning of the Second Amendment. Many Second Amendment cases in the 1970s and 1980s involved felons found in possession of firearms in violation of the Gun Control Act, who argued that the act violated their constitutional rights. Federal district and appellate courts tended to readily dismiss these claims, reading *Miller* as holding that the Second Amendment applied only to militias and not individuals.

That the Supreme Court did not get involved in these cases is probably not too significant. However, there was strong indication in the 1970s and 1980s that a number of justices, including Warren Burger, William O. Douglas,

and Lewis Powell, supported gun control as a matter of public policy and were inclined toward a militia-only reading of the amendment. One such indication occurred in the 1983 case *Quilici v. Morton Grove*, 695 F.2d 261 (7th Cir. 1982). In that case the Seventh Circuit Court of Appeals let stand an Illinois municipality's complete ban on the ownership of handguns. Although the Seventh Circuit's opinion rested on incorporation, the Supreme Court's denial of certiorari (i.e., refusal to hear the case) was certainly an indication of its lack of robust support for the individual-rights view of the amendment.

If the Court was reluctant to tackle the thorny issue of the Second Amendment and its implications for gun control, the Court was nonetheless not totally silent on the right to bear arms. Strangely enough, the Second Amendment has in modern times made a curious cameo appearance in cases involving the right to privacy. Justice John Harlan's dissent in the 1961 case *Poe v. Ullman* (367 U.S. 497 [1961]), which involved a Connecticut anticontraception statute, listed the right to have arms among the rights of the American people: "The full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided by the Constitution. This 'liberty' is not a series of isolated points priced out in terms of the taking of property; the freedom of speech, press and religion; the right to keep and bear arms." Harlan's language would be quoted in later cases involving contraception and abortion.

If the Supreme Court was reluctant to get into the controversy, other important legal actors were making pronouncements on the Second Amendment and the right to arms more generally. Some forty-four of the fifty states have provisions in their state constitutions granting the right to keep and bear arms. Although the federal jurisprudence on the right is somewhat thin, state courts have developed a rather robust jurisprudence in the area. Some state high courts have developed a fairly restrictive view of the right, allowing wide room for regulation and even prohibitions on certain classes of firearms, while others have maintained a fairly expansive view of the right. Congress has also played a role in Second Amendment interpretation. In 1982 the Senate Judiciary Committee's Subcommittee on the Con-stitution issued a report supporting the individual-rights view of the Second Amendment. Four years later Congress passed the Firearms Owners Protection Act, which protected the right of interstate travel with firearms. The statute was prefaced with congressional findings declaring the Second Amendment an individual right. Something of a milestone in the history of the Second Amendment came with the publication in 1989 of Sanford Levinson's article "The Embarrassing Second Amendment" in the *Yale Law Journal*. The Second Amendment, of course, had a long history of being the subject of academic commentary as well as the subject of a lively polemical literature by partisans on both sides of the gun-control debate, but Levinson's article took the debate in somewhat different directions. Although nineteenth-century legal commentators had discussed the amendment and although it had received some attention from historians, modern constitutional scholars had paid relatively little attention to the Second Amendment and its implications for gun control. Levinson's article sparked a reconsideration of the issue on the part of constitutional scholars. The debate would enter the nation's law reviews and constitutional treatises in the 1990s.

That rediscovery in the 1990s coincided with renewed public debate over gun control sparked in part by a rise in drug-connected crime in the inner cities. The debate over the Second Amendment took place amid larger debates over waiting periods, "assault weapons," and other issues.

The new scholarship and a more conservative judiciary brought about a greater willingness on the part of some federal jurists to give a more favorable consideration of the individual-rights view in the 1990s and beyond. In the 1989 case *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), Chief Justice William Rehnquist's opinion indicated that the term "the people" in the Second Amendment should be read as similar to "the people" in the First, Fourth, Ninth, and Tenth Amendments. Justice Clarence Thomas indicated a favorable disposition toward the individual-rights reading of the amendment in the 1997 case *Printz v. United States*, 521 U.S. 898 (1997). Justice Scalia expressed support for the individual-rights view in scholarly commentary. A major breakthrough for individual-rights advocates came in 2001 with the Fifth Circuit case *United States v. Emerson*, 46 F. Supp. 2d 598 (2001). In *Emerson*, which involved a Second Amendment challenge to the prosecution of an individual who possessed a firearm in violation of a restraining order, the Fifth Circuit Court of Appeals held that the Second Amendment was an individual right but that a restraining order prohibiting possession of firearms on the part of an individual suspected of domestic violence was reasonable regulation. In the 2004 case of *Nordyke v. King*, 364 F. 3d 1025 (9th Cir. 2004), five judges of the Ninth Circuit signed a dissenting opinion supporting the individual-rights view of the amendment.

In 2004 Attorney General John Ashcroft issued a formal advisory opinion on the Second Amendment that reflected Ashcroft's long-standing support for the individual-rights interpretation. As might be expected, the opinion was met with considerable criticism by advocates of stricter gun control and with enthusiasm by opponents of stricter gun control. The Ashcroft opinion was interesting for its detailed analysis of the history and meaning of the Second Amendment.

The Ashcroft opinion was a prelude to *Heller*. The District of Columbia's restrictive firearms' statute had long been a potential target of anti–gun control activists.

The statute prohibited the registration or possession of handguns not registered before the enactment of the legislation in 1976. The statute also required that rifles and shotguns owned by District residents had to be either disassembled or locked, rendering them ineffective for home defense. Plaintiff Dick Anthony Heller, a security guard in the District of Columbia, brought suit in the District Court to allow him to register the pistol he used at work, thus allowing him to use the firearm for home defense. Heller's lead attorney was Alan Gura.

Heller lost in the District Court. When the case went to the United Circuit Court of Appeals for the District of Columbia, Judge Laurence H. Silberman of that court wrote an opinion that for the first time struck down a statute on the grounds that it violated the Second Amendment. Silberman's opinion was upheld in an en banc hearing of the District of Columbia Circuit. In November 2007, the United States Supreme Court granted certiorari based on the petition of the District of Columbia's petition. Oral arguments were heard in March 2008.

The Court's decision was divided along ideological lines with the more generally conservative members of the Court, Chief Justice John Roberts and Justices Samuel Alito, Anthony Kennedy, Antonin Scalia, and Clarence Thomas, supporting the individual-rights view, and the more generally liberal justices, Stephen Breyer, Ruth Bader Ginsburg, David Souter, and John Paul Stevens, voting to uphold the District of Columbia statute. Justice Scalia, writing for the five-member majority, wrote an opinion declaring that the Second Amendment protected an individual right to own arms for private purposes, including home defense. Two dissents, one authored by Justice Stevens, the other by Justice Breyer, argued that the right protected either related only to service in an organized militia, or that even if a private right existed, it was subject to extensive regulation.

The Court's decision in *Heller* ended its long silence on the Second Amendment. Undoubtedly it will not be the last case. The District of Columbia case left many issues unresolved, issues that will have to be worked out in the lower federal courts and the Supreme Court itself. Because the District of Columbia is a federal enclave, *Heller* did not address the issue of incorporation or whether or not the Second Amendment applied to state regulations. It also did not address the question of the scope of permissible regulation. The decision indicated that total bans such as existed in the District of Columbia were constitutionally impermissible, but gave little hint as to what other kinds of regulation might be permitted under the Second Amendment. The decision in *Heller* has brought the Second Amendment and the right to keep and bear arms into a new phase in American legal history. Nonetheless it is clear that despite *Heller* both will remain the subjects of vigorous debate for decades to come.

[*See also* Civil Rights and Civil Liberties in United States Law; Constitution of the United States, *subentry on* Amendments to the Constitution; *and* United States Law.]

BIBLIOGRAPHY

Amar, Akhil Reed. "The Bill of Rights as a Constitution." *Yale Law Journal* 100 (1991): 1131–1210.

Cooley, Thomas M., *The General Principles of Constitutional Law in the United States of America*. Boston: Little, Brown, 1898.

Cornell, Saul. "A New Paradigm for the Second Amendment" *Law and History Review* 22 (2004): 161–167.

Cottrol, Robert J., and Raymond T. Diamond. "The Second Amendment: Toward an Afro-Americanist Reconsideration." *Georgetown Law Journal* 80 (1991): 309–361.

Cress, Lawrence Delbert, "An Armed Community: The Origins and Meanings of the Right to Bear Arms." *Journal of American History* 71 (1984): 22–42.

Halbrook, Stephen P.. *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms, 1866–1876*. Westport, Conn: Praeger, 1998. Halbrook explores the often-neglected topic of the role of the right to keep and bear arms in the debates on the fourteenth amendment and Reconstruction-era civil-rights statutes. The work is a valuable resource for students of both Second- and Fourteenth-Amendment history.

Kates, Don B., Jr. "Handgun Prohibition and the Original Meaning of the Second Amendment." *Michigan Law Review* 82 (1983): 204–273.

Levinson, Sanford. "The Embarrassing Second Amendment." *Yale Law Journal* 99 (1989): 637–659.

Lund, Nelson. "The Second Amendment, Political Liberty, and the Right to Self-Preservation." *Alabama Law Review* 39 (1987): 103–130.

Malcolm, Joyce Lee. *To Keep and Bear Arms: The Origins of an Anglo-American Right*. Cambridge, Mass: Harvard University Press, 1994. Malcolm provides the definitive exploration of the arms provision in the English Bill of Rights of 1689, as well as an important look at that provision's influence on subsequent English law and the Second Amendment to the U.S. Constitution.

Rakove, Jack N. "The Second Amendment: The Highest Stage of Originalism." *Chicago-Kent Law Review* 76 (2000): 103–166.

Story, Joseph. *Commentaries on the Constitution of the United States. Reprinted with an introduction* by D. Ronald Rotunda and John E. Nowak. Durham, N.C.: Carolina Academic Press, 1987.

Tucker, St. George, ed. *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia*, vol. 1. Philadelphia: Birch and A. Small, 1803. Tucker edited the first American edition of *Blackstone's Commentaries*. This is a valuable source not only for Blackstone's views on the right to bear arms at English law but also for Tucker's views contrasting the English right with the Second Amendment. *Blackstone's Commentaries* was a critical vehicle for teaching the basic principles of the common law for the founding generation and throughout the antebellum era.

United States Congress. Senate. Committee on the Judiciary, Subcommittee on the Constitution. *The Right to Keep and Bear Arms*. 97th Cong., 2d sess., 1982.

United States Department of Justice, Office of the Attorney General. *Whether the Second Amendment Secures an Individual Right: Memorandum Opinion for the Attorney General.*, by Steven G. Bradbury, Howard C. Nielson Jr., and C. Kevin Marshall. Washington, D.C., 2004.

ROBERT J. COTTROL